

STATE OF MICHIGAN
COURT OF APPEALS

TERI LYNN GALLANT,

Plaintiff-Appellee,

v

JON ANDREW GALLANT, JR.,

Defendant-Appellant,

and

GALLANT TRANSPORT, INC. and JON
ANDREW GALLANT, SR.,

Defendant/Intervenor-Appellee.

UNPUBLISHED

June 21, 2007

No. 265396

Jackson Circuit Court

LC No. 03-002034-DM

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant, Jon Andrew Gallant, Jr., appeals the judgment of divorce in this action filed by plaintiff, Teri Lynn Gallant.

I. Facts

Plaintiff and defendant married in 1981. Before they wed, defendant started a transport business and a lubrication management company that serviced machines at area auto plants. In 1978, defendant left college to work full time for his businesses. The same year, defendant incorporated both businesses as Gallant Transport, Inc., after his father, Jon Gallant, Sr., joined him as a partner. After a few years, defendant and his father divided the business into Gallant Transport, Inc., the transport company, and Gallant Industrial Services, Inc., the lubrication management company. Thereafter, defendant and his father also formed J & J Real Estate, a real estate holding company for the two other businesses. It is undisputed that defendant and his father each own 50 percent of the companies and that, by voting agreement, Jon Gallant, Sr., controls 51 percent of the voting stock of Gallant Transport and Gallant Industrial Services.

During the marriage, plaintiff stayed home and raised the parties' six children. Plaintiff did not attend college and she testified that, during the marriage, though she painted a few murals for friends and family, she did not otherwise work outside the home. After she filed for divorce,

plaintiff held a part-time job and, at times, worked nights at a tanning salon. At the time of trial, plaintiff was 43 years old, defendant was 49 years old, and they had three minor children living at home.

Before trial, defendant agreed to pay \$800 per month in child support. In its judgment, the trial court awarded plaintiff the marital home and its contents, and awarded defendant his businesses, including real estate and equipment. The trial court awarded plaintiff \$700 per month in alimony for five years, insurance coverage, and approximately 65 percent of defendant's 401(k), plus a portion of her household expenses during the litigation. Defendant contends that the property division and the amount of spousal support awarded to plaintiff is inequitable.

II. Analysis

"In a divorce case, this Court must first review the trial court's findings of fact regarding the valuations of particular marital assets under the clearly erroneous standard." *Draggo v Draggo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). "If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Id.* at 629-630, citing *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). A trial court's "ruling should be affirmed unless the appellate court is left with the firm conviction that the division was inequitable." *Sparks, supra* at 152. When applicable, courts should consider the following factors when making a property division: "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." *Id.* at 159-160.

With regard to spousal support, as this Court explained in *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003):

The award of alimony is in the trial court's discretion. *Pelton v Pelton*, 167 Mich App 22, 27; 421 NW2d 560 (1988). The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case. [*Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).] Among the factors that should be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. *Ianitelli v Ianitelli*, 199 Mich App 641, 644; 502 NW2d 691 (1993); *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991).

Here, the trial court's findings of fact on the value of the marital assets were not clearly erroneous.

On the basis of expert testimony, the trial court found that the marital home was worth \$192,000, and the net equity in the home was \$145,869. The parties presented differing evidence about defendant's income at the time of trial and defendant argues that his spousal support obligation is too high in light of his current salary. Plaintiff's expert, Edward Dupke, testified that the value of Gallant Industrial Services had diminished in the two years prior to trial, ostensibly because of changes in how the auto companies hire outside services. Dupke testified that sales for the year ending December 31, 1999 were about \$1.6 million, \$1.8 million for year ending 2000, and for the year ending in 2001, the sales were \$1.4 million. Dupke further testified that, in 2002, sales declined to \$445,000 and, for 2003, sales were \$379,000. Dupke observed that Gallant Transport had revenues of \$2.8 million in 1999, \$3 million in 2000, \$2.6 million in 2001, \$2.2 million in 2002, and \$2.4 million in 2003. Dupke testified that, when Gallant Industrial Services was doing well in 2000 and 2001, defendant received officer's compensation of \$350,000 and \$340,000 per year. But, Dupke noted that, in 2003, defendant earned \$32,000. Dupke also stated that defendant and his father did payroll out of one company and then did a charge-back to the other company to balance the payroll charge. This was not improper, according to Dupke, but he observed that it was within defendant's control to determine the amount of his salary.

According to defendant, he and his father capped director compensation at Gallant Industrial Services, which resulted in his reduced income. He testified that he grosses a thousand dollars every other week. Defendant maintained that he received a total of \$26,000 a year in salary and \$8,000 a year in rental income from J & J Real Estate. According to defendant, business for Gallant Transport had diminished to the point that his brother, who helps run the company, had to get a part-time job to supplement his income. Defendant's expert, William King, submitted that defendant's average salary for the five years prior to trial was \$314,185, though his salary fell significantly in the two years before trial.

In its findings of fact, the trial court concluded that testimony established that defendant earned \$32,623 in 2002 and \$26,326 in 2003. However, the trial court also observed that "the Court is not unmindful that the Defendant has authority to increase his income and, based on past earnings, it is persuasive that 2002 and 2003 do not properly consider an unexercised ability to earn income at a level consistent with compensation he received in earlier years." The trial court's conclusions were correct. Uncontroverted testimony established that defendant's income dropped precipitously in 2002 and 2003 and that he declared very little in income during those years. However, evidence established that defendant decided his own salary and that he could increase his income if he so desired, particularly in light of Gallant Transport's continued financial viability.

The trial court also valued defendant's businesses on the basis of expert testimony at trial. To value Gallant Industrial Services, the trial court "balanced" the testimony of the two expert valuations and concluded that, as to defendant, the business is worth \$10,000. With regard to J & J Real Estate, plaintiff's expert valued the company at \$404,000, and defendant's expert valued it at \$230,000. Including the land and depreciation for a 35-year-old building, the trial court valued J & J Real Estate at \$140,204, with defendant's half totaling \$70,000. It was

undisputed that defendant's 401(k) through his businesses had a balance of \$488,787.62 when it was valued on July 12, 2004.

A. Value of Gallant Transport and Life Insurance Policies

Defendant asserts that the trial court initially erred when it valued Gallant Transport at \$214,835, because defendant's actual interest in the business was only 50 percent of that, or \$107,417.50. However, as plaintiff notes, the trial court corrected the error and, in its first judgment on January 6, 2005, the trial court took \$107,417.50 from plaintiff's 401(k) award to correct its mistake. Defendant refused to sign the judgment and took issue with several of the trial court's findings and conclusions, including the trial court's ruling that plaintiff was entitled to an interest in the corporate insurance policies that insured the life of both defendant and his father.

The trial court initially ordered defendant to maintain four life insurance policies through his businesses, two that insured defendant's life and two that insured the life of his father, Jon Gallant, Sr., with death benefits totaling \$2 million. The court first explained that the purpose of the order was to ensure that defendant's spousal and child support obligations would continue if he died. The court later added that it intended part of the death benefit to go to plaintiff in lieu of a longer period or larger amount of spousal support. Defendant disputed this portion of the judgment, among others, and Gallant Transport and Jon Gallant, Sr. intervened in the case to challenge the order. The trial court ultimately agreed with defendant and the intervenors and ruled that it had no jurisdiction to order them to maintain the policies or to award the death benefits to plaintiff.

However, the trial court made clear that the reason it granted plaintiff an interest in the insurance benefits was to offset its relatively small award of spousal support to plaintiff. The trial court awarded plaintiff \$700 per month for five years, in order to allow her to go back to school or to otherwise acquire job skills. Under the circumstances, the trial court's observation was correct. Because plaintiff married defendant shortly after high school and stayed home for more than 23 years to care for their children, and that defendant earned, or could earn, a significant income from his businesses, it was not inequitable for the trial court to conclude that plaintiff was entitled to either more spousal support or a larger part of the marital estate than it initially awarded. Moreover, when they were married, plaintiff and defendant lived on an income many times higher than the amount of spousal support the trial court awarded. It was clearly not inequitable to award plaintiff a fraction of that income to allow her to maintain the home and the life to which she and the children had been accustomed.

B. Health Insurance and 401(k)

Defendant also takes issue with the trial court's decision to award plaintiff the additional \$107,000 from defendant's 401(k), the interest earned on the 401(k) during the proceedings, and health, dental and optical insurance coverage. Specifically, he asserts that the awards were improper because the trial court did not find him at fault for the breakdown of the marriage and because they are inequitable in light of the circumstances of the case.

In *Sparks*, *supra* at 158, our Supreme Court stated "that the conduct of the parties during the marriage may be relevant to the distribution of property, but the trial court must consider all

the relevant factors and not assign disproportionate weight to any one circumstance.” This Court reiterated in *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999), that “each factor need not be given equal weight where the circumstances dictate otherwise.” In *Sparks, supra* at 163, our Supreme Court also said that “[m]arital misconduct is only one factor among many and should not be dispositive.”

Thus, notwithstanding that the trial court did not find either party to be at fault for the breakup of the marriage, other factors established that plaintiff should receive a greater share of the marital estate. As we noted above, not only did defendant have a far greater income potential from his businesses, plaintiff had no higher education, little to no work experience, and she raised the children for 23 years while defendant built his businesses. Further, without some monetary assets, plaintiff could not afford to maintain the home in which three minor children lived. Given the tremendous disparity in the parties’ earning abilities and work experience, the trial court’s award of the additional money from the 401(k) to plaintiff was fair and equitable. For the same reasons, the trial court’s decision to grant plaintiff the interest earned on the 401(k) between July 12, 2004 when it was valued until the date of segregation by the plan provider, approximately \$60,000, was not unfair or inequitable. Under these circumstances, we are not “left with the firm conviction that the division was inequitable.” *Sparks, supra* at 152.

Further, we are not persuaded that it was inequitable for the trial court to order defendant to pay for plaintiff’s health, dental, prescription and optical insurance. Though defendant asserts that plaintiff was never provided such comprehensive insurance during the marriage, we found no evidence at trial to establish whether plaintiff had such insurance coverage before the divorce. Regardless, the trial court’s ruling stated that the benefits would continue, “until such time as she obtains employment or has comparable insurance she can obtain at a reasonable price through her employment or through the government when she becomes eligible.” As a practical matter, it appears likely that plaintiff will have to secure employment to support herself, because her spousal support of \$700 per month will cease five years after the divorce judgment and any monetary award will not last forever. Thus, defendant’s obligation will cease once plaintiff begins a job or has other, reasonably affordable coverage. Under the circumstances, the trial court’s ruling was both fair and equitable.

C. Decreasing Insurance Policies

Defendant also complains that the trial court should not have required him to maintain decreasing term life insurance and disability insurance policies in order to ensure that he could continue his child support and spousal support obligations. Defendant has waived this issue. As plaintiff points out, defendant affirmatively *suggested* to the trial court that he maintain a decreasing term insurance policy to cover 110 percent of his support obligations, in lieu of plaintiff receiving a portion of the death benefits in the corporate life insurance policies. It is well-settled that “[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Further, “error requiring reversal may only be predicated on the trial court’s actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.” *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Again, defendant recommended that he be ordered to obtain the diminishing policies to cover his obligations and he will not be heard to argue otherwise on appeal.

D. Household Expenses

Defendant contends that the trial court unfairly ordered him to pay some of plaintiff's household expenses during the litigation. Again, plaintiff was earning little to no income during the trial, defendant's support obligations did not begin until months after plaintiff filed for divorce, and three minor children lived at home during the litigation. The trial court ultimately awarded plaintiff \$4,831.30 in living expenses. Defendant asserts that this was improper because the trial occurred in September 2004 and defendant was obligated to pay these expenses through August 5, 2005, just before the final amended judgment was entered. As plaintiff notes, the original judgment of divorce contemplated that plaintiff would begin to make mortgage, insurance, and tax payments after the judgment of divorce was entered. For months, however, the parties could not finalize defendant's spousal support obligation or the division of the marital estate, so the trial court agreed that defendant should contribute to the maintenance of the household. Defendant provides no basis for us to conclude that this decision was inequitable.

E. Stipulation

Finally, defendant complains that he should not be bound by his stipulation to pay half of his children's parochial school expenses. According to defendant, plaintiff was not similarly bound by her stipulation regarding mortgage expenses. Defendant fails to explain how the stipulations are related or how they both affected the parties. Though no writing in the record clarifies the parameters of plaintiff's stipulation, it appears that plaintiff's stipulation involved her agreement that defendant could make direct mortgage payments as part of his monthly alimony obligation. However, on the basis of this limited explanation, we agree with plaintiff that, regardless whether defendant paid the mortgage company or plaintiff, the amount of defendant's alimony obligation would remain the same. Because it would have no apparent impact on defendant, defendant failed to establish how this stipulation compares to defendant's agreement to pay for half of his children's education expenses. Accordingly, and because the trial court's decision was clearly fair and equitable, defendant's argument is without merit.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray